Playing with Fire:
Incurring Liability as an Expert Witness

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You may have thought about it when an expert testified against you. How can they say those things? Aren't they slandering me? If you provide expert testimony or serve as a consulting expert, can you be held liable for the things you say? Until recently, the answer was 'no'.

As litigation has involved more complex disputes, lawyers, courts and juries have come to rely on expert witnesses to explain the issues. Construction lawyers frequently hire experts to help sort through the prelitigation fact finding. A/e's are also retained to provide recommendations for remedial measures to be undertaken, even if litigation does not proceed. In this sense, a/e's providing expert witness services are no different than a/e's providing any other design services. The law is beginning to distinguish between services provided in the litigation context from those provided to noncombatants.

Witness Immunity

Certain positions have always enjoyed some form of immunity because of the social importance of their work. One cannot sue a judge for negligence or malpractice, for example. This is essentially an "absolute" immunity from liability arising out of the judge's work. Police and prosecutors have immunity, even when they arrest or prosecute an innocent person, so long as they do not violate civil rights in the process. This is a partial or "qualified" immunity. What about a court-appointed psychiatrist, appointed to provide an opinion on a criminal defendant's mental state? The courts have held that such persons were entitled to absolute immunity from liability, even when sued by the criminal defendant himself.

The general rule for testifying witnesses was one of immunity. The law sought to encourage witnesses to come forward and to tell the truth without fear of retribution. To do so, the law completely immunized witnesses from liability for statements made in court. The concept was intended to shield witnesses from lawsuits filed by the "other side" of the lawsuit in which they testified, whether for defamation or some other theory.

But what about experts hired by your own lawyers to help your own position in a lawsuit? If your property has been damaged and you hire an expert to testify to the cost of the repairs, you have paid that expert for professional services. If you win the lawsuit and recover the amount estimated by your expert, you should be able to rely on the expert's valuation. If it turns out to cost more than the expert's estimates, should you be able to recover the difference from the expert? What if the expert failed to provide their services with reasonable care and skill? Cases as recently as ten years ago held that the witness was immune anyway.

In a more recent case, however, a party was allowed to sue its own expert for accounting malpractice after their lawsuit was dismissed (the case was dismissed before trial allegedly because of the expert's fabrication of evidence). A California Court of Appeals distinguished between the traditional immunity afforded a typical witness from the immunity that should be afforded a retained expert. Retained experts, the court reasoned, were more like attorneys and advocates than impartial occurrence witnesses. Attorneys can be sued for malpractice arising out of their services in litigation matters. There was no real distinction between attorneys and retained accounting experts. The Missouri Supreme Court reached a similar result when dealing with an engineering expert's arbitration testimony.

Into the Looking Glass

There are so many factors, players and actions that go into the result of any litigation. Even if an expert fails to exercise reasonable care in providing testimony for a lawsuit and you lose, how can you tell if it was the expert's fault? Here too, the California Court of Appeals borrowed from the context of legal malpractice cases. In a claim against an attorney, a client must prove that they would have won the lawsuit if the lawyer hadn't been negligent. This effectively requires the client to prove the earlier case within the malpractice case. Applying this "case within a case" analysis, one must be able to prove that they would have won "but for" the negligence of their expert. That way, the lawyer is only responsible for errors that affected the outcome.

The California accounting case is the only case known to apply liability and to use this "but for" standard, but California law can be influential on other courts in other states. In a sense, this standard is more protective than the standard applied to other services provided by design professionals. If an a/e is sued for work on a project, liability may be imposed in some circumstances where an a/e's negligence was a cause. In the expert "but for" analysis, the expert's work must be shown to be the cause of a loss at trial.

Playing With Fire

The recent case law discussed above may represent a trend. Note, however, that neither of the cases discussed above involved testimony in court, but the experts in both cases were sued by their own clients. Many states still provide absolute immunity for experts who testify in court. The law in light of recent trends is less clear with respect to work outside of actual testimony at trial. The cases still seem to resist the imposition of liability to third parties or the other parties to the lawsuit.

For now, a/e's providing expert witness services should be aware that they may be held to a reasonable degree of care and skill and that any adverse result in litigation can lead to finger-pointing and further litigation.

About the Author: Eric L. Singer is with Wildman, Harrold, Allen & Dixon, Lisle, Illinois. His practice concentrates in construction law and in the representation of design professionals in all aspects of construction claims and dispute resolution.

NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.